

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

20 Cr. 494 (PGG)

5 ROBERT ADAMS,

6 Defendant.

Conference

7 -----x
8 New York, N.Y.
9 October 25, 2021
2:15 p.m.

10 Before:

11 HON. PAUL G. GARDEPHE,

12 District Judge

13 APPEARANCES

14 DAMIAN WILLIAMS

15 United States Attorney for the
Southern District of New York

16 BY: JARROD L. SCHAEFFER

RUSHMI BHASKARAN

17 Assistant United States Attorneys

18 SAMUEL GREGORY

19 ZACHARY TAYLOR

Attorneys for Defendant

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THE COURT: Please be seated. Sorry for the delay.

I am trying a case across the street. The jury is deliberating, and they sent out several notes, so I had to address those.

So I understand there is a superseding indictment that Mr. Adams needs to be arraigned on.

Is that correct?

MR. SCHAEFFER: That's correct, your Honor.

THE COURT: All right. Mr. Adams, would you please rise. You are here this afternoon with your attorneys, Mr. Adams?

THE DEFENDANT: Yes.

THE COURT: Is that correct?

THE DEFENDANT: Yes.

THE COURT: Have you received a copy of the superseding indictment, which reflects the charges against you?

THE DEFENDANT: Yes, your Honor.

THE COURT: Have you discussed the superseding indictment with your attorney?

THE DEFENDANT: Yes, your Honor.

THE COURT: Count One of the superseding indictment charges you with violating 18 United States Code, Section 201(b)(2), which generally relates to bribery.

Count Two charges you with violating 18 United States

1 Code, Section 873, which generally relates to blackmail.

2 And Count Three of the superseding indictment charges
3 you with violating 18 United States Code, Section 4, which is
4 misprision of a felony. As to that charge the government
5 contends that you concealed knowledge of the commission of a
6 federal felony offense.

7 Do you wish me to read the superseding indictment to
8 you now here in open court, Mr. Adams?

9 THE DEFENDANT: No.

10 THE COURT: Then I ask you now with respect to Count
11 One of the superseding indictment, how do you plead? Guilty or
12 not guilty?

13 THE DEFENDANT: Not guilty.

14 THE COURT: As to Count Two of the superseding
15 indictment, how to you plead? Guilty or not guilty?

16 THE DEFENDANT: Not guilty.

17 THE COURT: And as to Count Three of the superseding
18 indictment, how do you plead? Guilty or not guilty?

19 THE DEFENDANT: Not guilty.

20 THE COURT: Thank you. You may be seated.

21 THE DEFENDANT: Yes, your Honor.

22 THE COURT: I will now address the parties' motions *in*
23 *limine*. I will begin with the government's motions.

24 The government has moved to introduce certain
25 statements which it characterizes as prior consistent

1 statements of an individual that the government refers to as
2 Visitor-1; also, certain internet searches performed by
3 Visitor-1.

4 I will give some background.

5 Visitor-1 is expected to testify that, on July 5,
6 2019, Adams confronted her at the MCC after determining that
7 she had smuggled in contraband to an inmate, Keith Outlaw.
8 Citing government's motion *in limine* brief, Docket No. 33 at
9 page 4, and the defendant's motion *in limine* opposition, Docket
10 No. 40 at page 2.

11 Instead of reporting Visitor-1's smuggling in of the
12 contraband, Mr. Adams allegedly told her that she "would be in
13 trouble unless she met him at a nearby pizzeria that evening."
14 Citing the government's motion *in limine* brief, Docket No. 33,
15 page 4.

16 Visitor-1 met Adams that night at the pizzeria, where
17 he instructed her to get into his car. Adams then drove
18 Visitor-1 to a motel and told her that, if she had sex with
19 him, she could continue to visit the MCC. Visitor-1 is
20 expected to testify she did not want to have sex with the
21 defendant, but feared that he would report her conduct to law
22 enforcement and that her MCC visiting privileges would be
23 revoked if she did not. Accordingly, Visitor-1 had sex with
24 Adams at the motel. *Id.*

25 After the having sex with Adams, Visitor-1 was

1 permitted to continue her inmate visits at the MCC. In
2 subsequent visits, she again smuggled or attempted to smuggle
3 contraband into the facility.

4 On or about July 26, 2019, Visitor-1 arrived at the
5 MCC to visit inmate Outlaw, but Adams turned her away, saying
6 that there was a risk that Outlaw would get into a fight with
7 another inmate in the visiting room.

8 While escorting Visitor-1 out of the MCC, Adams
9 slapped her buttocks in an elevator and commented that
10 Visitor-1 was having a "dry month," which she understood to be
11 a comment on her inability to get paid for delivering
12 contraband to Outlaw. *Id.* at page 5.

13 The government has identified two prior statements
14 made by Visitor-1, and two internet searches performed by her,
15 that it argues are consistent with her anticipated testimony,
16 and could be used to rehabilitate Visitor-1's credibility as a
17 witness under Federal Rule of Evidence 801(b)(1)(B).

18 The internet searches are as follows:

19 On July 6, 2019, the day after she had sex with Adams,
20 Visitor-1 conducted several searches which involved various
21 iterations of "Federal Correctional officer Robert Adams."
22 Citing the government's motion *in limine* brief, Docket No. 33
23 at page 5.

24 And on July 7, 2019, Visitor-1 took a screen shot of a
25 press release relating to the prosecution of another MCC

1 corrections officer who had been charged with bribery and
2 smuggling-related offenses. *Id.*

3 As to the prior statements, in a July 8, 2019 text,
4 Visitor-1 told a friend that something "weird happened to me."
5 Using a racial epithet, Visitor-1 said that this individual
6 "took the condom off." The friend responded, "What you mean
7 something weird. He took the pussy?"

8 Visitor-1 wrote in response, "Nah, bribed me. Then
9 pulled the condom off the last 20 seconds."

10 After the friend asked Visitor-1 who had done this,
11 Visitor-1 responded, "He a officer, federal officer." *Id.*

12 And in a July 26, 2019 text -- the same day that Adams
13 had turned Visitor-1 away from the MCC -- Visitor-1 texted a
14 different friend about her upcoming visit to the MCC. Before
15 leaving for the MCC, Visitor-1 texted her friend that she was
16 "ready to see" Outlaw at the MCC. Later that day, Visitor-1
17 texted this friend that she "couldn't see him," and that she
18 was now "broke."

19 The friend asked, "dam the co-[racial epithet] wasn't
20 there?" to which Visitor-1 responded, "Yeah, he was rubbing my
21 butt, talking about he can't get him." *Id.* at pages 5 to 6.

22 Adams has not objected to the government's proposed
23 introduction of Visitor-1's prior statements and Internet
24 searches. Citing defendant's motion *in limine* opposition,
25 Docket No. 40 at pages 2 through 10.

1 I will nonetheless reserve decision on the
2 government's application as to these internet searches and
3 statements, because their relevance is not clear to me.

4 Based on the defendant's briefing to date, it appears
5 that he will not dispute that he had sex with Visitor-1 after
6 discovering that she had brought in contraband to the MCC.
7 Because it appears that Adams will not deny his encounter with
8 Visitor-1 at the MCC and the sex thereafter, the internet
9 searches about Adams and bribery and smuggling offenses
10 committed by another MCC corrections officer do not appear
11 relevant. And the press release is likely more prejudicial
12 than probative under Federal Rule of Evidence 403.

13 The July 26, 2019, text message would likewise only
14 become relevant if the defendant denied the July 26, 2019,
15 encounter with Visitor-1. At this point, I don't have any
16 reason to believe that he will deny that encounter.

17 As to the July 8, 2019, text message, Visitor-1 writes
18 that the "federal officer" "bribed" her. That is a somewhat
19 confusing reference because the government's theory is that the
20 defendant coerced Visitor-1 into having sex, not that he bribed
21 her into having sex.

22 Because it is not clear to me that the statements and
23 internet searches proffered by the government are relevant, I
24 will reserve decision on the government's motion.

25 The government has moved to preclude Adams from

1 eliciting that Visitor-1, after having second with other men,
2 asked those men for money. Citing the government's motion *in*
3 *limine* brief at Docket No. 33, page 2.

4 According to the government, in text messages with
5 Adams, Visitor-1 asked him for money. *Id.* at 10, No. 4.

6 Moreover, Visitor-1 took a screen shot of her CashApp
7 account, which shows that she found the defendant on CashApp
8 and drafted a money request to him. There's no evidence the
9 request was ever sent. *Id.*

10 According to Adams, when investigators asked Visitor-1
11 about the text message she had sent to him requesting money,
12 Visitor-1 told the investigators that "she asks boys for money
13 all the time." Citing defendant's motion *in limine* brief,
14 Docket No. 38, page 6.

15 Adams seeks to cross-examine Visitor-1 about this
16 statement and other evidence showing that Visitor-1 has a
17 practice of asking men, with whom she has had sex, for money.
18 *Id.*

19 Adams argues that such evidence is "crucial to explain
20 the requests for money that she directed to Mr. Adams." Adams
21 argues that a refusal to admit such evidence "could give rise
22 to a false inference -- namely, that there was something out of
23 the ordinary about Visitor-1's liaison with Mr. Adams that
24 justified her asking him for money or gave her leverage over
25 him." *Id.* at 6 to 7.

1 The government, for its part, argues that any evidence
2 that Visitor-1 asked previous sexual partners for money should
3 be excluded under Federal Rule of Evidence 412 and 403.
4 Although the government concedes that evidence that Visitor-1
5 asked Adams for money is an appropriate topic for
6 cross-examination, the government objects to Adams eliciting
7 from Visitor-1 that she has made similar requests of other men
8 with whom she has had sex. Government motion *in limine* brief,
9 Docket No. 33 at page 10, note 4.

10 Federal Rule of Evidence 412(a) provides that, "in a
11 criminal proceeding involving alleged sexual misconduct," no
12 party may introduce "(1) evidence offered to prove that a
13 victim engaged in other sexual behavior; or (2) evidence
14 offered to prove a victim's sexual predisposition."

15 Although the rule originally applied only to cases in
16 which certain sex offenses were charged, in 1994 it was amended
17 to apply to any proceeding "involving alleged sexual
18 misconduct."

19 The 1994 Amendment Committee Note to Rule 412 explains
20 that:

21 "The strong social policy of protecting a victim's
22 privacy and encouraging victims to come forward to report
23 criminal acts is not confined to cases that involve a charge of
24 sexual assault. The need to protect the victim is equally
25 great when a defendant is charged with kidnapping, and evidence

1 is offered, either to prove motive or as background, that the
2 defendant sexually assaulted the victim."

3 Accordingly, Rule 412 may apply to a criminal
4 proceeding "even where a defendant is not charged with sexual
5 misconduct." Citing *United States v. Doe* 2008 WL 4964615 at *3
6 (S.D.N.Y. October 21, 2008).

7 Where Rule 412 is applicable, parties are precluded
8 from eliciting evidence of a victim's previous "sexual
9 behavior" or the victim's "sexual predisposition." The Second
10 Circuit has made clear that these terms are to be interpreted
11 broadly, explaining, for example, that "behavior encompasses
12 activities of the mind, such as fantasies." Citing *Wallock v.*
13 *Spucci* 217 F.3d 157, 160 (2d Cir. 2000), which in turn is
14 quoting Federal Rule of Evidence 412, 1994 Amendment
15 Committee's note. Moreover, "Rule 412's ban on sexual
16 predisposition evidence includes matters relating to the
17 alleged victim's mode of dress, speech or lifestyle." *Id.*

18 Rule 412's bar on sexual behavior or predisposition
19 evidence "is not absolute" however. Citing *United States v.*
20 *Rivera*, 799 F.3d 180, 184 (2d Cir. 2015). Indeed, Rule 412(b)
21 "makes explicit that evidence whose exclusion would violate the
22 defendant's constitutional rights should be admitted," *id.*,
23 which in turn is quoting Federal Rule of Evidence 412(b)(1)(C).
24 "The constitutional rights contemplated by this exception
25 include the accused's rights under the Sixth Amendment to

1 confront a witness," *id.*, including "by impeaching the
2 credibility of a prosecution witness by cross-examination." *Id.*
3 at 185.

4 Accordingly, in a criminal case, where proffered
5 evidence falls within the scope of Rule 412, courts must
6 balance the relevance of the evidence in effectively
7 cross-examining the victim against the harm that Rule 412 seeks
8 to protect against -- namely, "invasion of privacy, potential
9 embarrassment and sexual stereotyping that is associated with
10 disclosure of intimate sexual details." See *Id.* at 184-185.

11 Even if evidence of a victim's other sexual behavior
12 or sexual predisposition is not barred by Rule 412, it may, of
13 course, be excluded under Rule 403 as substantially more
14 prejudicial than probative. See, e.g., *United States v.*
15 *Graham*, 2013WL 321568 *3 (W.D.N.Y., January 28, 2013)
16 (explaining that even if evidence of a victim's sexual behavior
17 provides some basis for impeaching a witness, it is still
18 subject to exclusion under Rule 404).

19 As a preliminary matter, Adams argues that Rule 412
20 does not apply here because he's not charged with "sexual
21 misconduct" and Visitor-1 is not the "victim" of "sexual
22 misconduct" within the meaning of Rule 412. Citing defendant's
23 motion *in limine* brief, Docket No. 38 at page 7, note 2.

24 But Count Two charges that Adams used blackmail to
25 coerce Visitor-1 into having sex. According to the government,

1 Adams "under a threat of informing, or as consideration for not
2 informing, against any violation of any law of the United
3 States" -- "demanded or received" a thing of value. Citing 18
4 United States Code, Section 873.

5 Here, that thing of value was sex. The government's
6 theory is that Visitor-1 is the "victim" of Adams' alleged
7 blackmail in that he demanded sex from Visitor-1 in exchange
8 for not reporting her violation of federal law. Adams' conduct
9 can thus be fairly described as "sexual misconduct."

10 And, as I noted earlier, Rule 412 is no longer limited
11 to criminal proceedings in which the defendant is charged with
12 a sex crime. See *Doe* 2008 WL 4696415 at *3.

13 I conclude that this case involved alleged sexual
14 misconduct and that Visitor-1 is an alleged victim of sexual
15 misconduct for purposes of Rule 412.

16 I further conclude that evidence that Visitor-1 sought
17 money from other men with whom she had sex constitutes evidence
18 of her "sexual behavior" or "sexual predisposition."

19 Adams contends that if he refers to Visitor-1's other
20 sexual partners as "boyfriends" or as "men she was dating,"
21 Rule 412 would become inapplicable. According to Adams, use of
22 these terms would "leave ambiguous whether those relationships
23 were of a sexual nature." Citing defendant's motion *in limine*
24 brief, Docket No. 38 at page 6.

25 This argument is not persuasive.

1 It seems likely that if I were to permit defense
2 counsel to examine Visitor-1 about her conduct with other
3 "boyfriends" or dating partners, including that she requested
4 money from them, the jury would likely conclude -- based on her
5 conduct with Adams -- that these relationships involved sex.
6 Accordingly, the solution proposed by defense counsel is simply
7 an improper device to evade Rule 412's restrictions on asking
8 an alleged victim about other sexual relationships.

9 In sum, I conclude that Rule 412 prohibits the
10 questioning of Visitor-1 as to whether she requested money from
11 other sexual partners, "boyfriends," or dating partners.

12 Adams argues, however, that even if the proffered
13 evidence about Visitor-1's sexual behavior is prohibited by
14 Rule 412(a), it still should be admitted under the exception
15 set forth in Rule 412(b)(1)(C) for evidence whose exclusion
16 would violate the defendant's constitutional rights. Citing
17 defendant's motion *in limine* brief, Docket No. 38 at page 7.

18 This argument is likewise not persuasive.

19 While Adams has a Sixth Amendment right to confront
20 the government's key witness and present a complete defense at
21 trial, precluding evidence that Visitor-1 asked men with whom
22 she had had sex for money will not impinge on Adams' Sixth
23 Amendment rights.

24 As an initial matter, Adams will be permitted to
25 cross-examine Visitor-1 about her texts to Adams in which she

1 asks for money, along with the screen shot of her draft CashApp
2 request to Adams. Adams will therefore be able to use this
3 evidence to argue that Visitor-1 and Adams had a relationship
4 that went beyond the quid pro quo alleged by the government in
5 which Visitor-1 provided sex to Adams in exchange for him not
6 reporting her misconduct and allowing her to continue her
7 visits to the MCC.

8 Moreover, Visitor-1's requests for money from other
9 men appear to have little probative value. Adams claims that
10 he would use this conduct to rebut an inference that the
11 encounter between him and Visitor-1 was "out of the ordinary"
12 or that Visitor-1 believed that she had somehow had leverage
13 over Adams. *Id.* at pages 6 to 7.

14 These arguments are not persuasive.

15 To the extent that Adams intends to argue that it is
16 normal or typical for a woman to request money from someone
17 with whom she has had sex, it is not. To the contrary, this
18 evidence would suggest that Visitor-1 is, in effect, a
19 prostitute -- someone who trades sexual favors for money.

20 To the extent that Adams wishes to argue that it was
21 not "out of the ordinary" for Visitor-1 to request money from
22 men with whom she has had sex, this evidence is of little
23 probative value, because here Adams already has evidence
24 available to him suggesting that Visitor-1 was attempting to
25 trade sexual favors for money -- namely, Visitor-1's request

1 for money to Adams and the draft CashApp request. There is
2 also evidence that Visitor-1 sent Adams several sexually
3 charged messages and images without his prompting. See
4 government's motion *in limine* opposition, Docket No. 39 at page
5 3.

6 Adams thus already has ample evidence to (1) attack
7 Visitor-1's account of the alleged sexual coercion and quid pro
8 quo relationship between her and Adams; and (2) to argue that
9 the two were merely engaged in a consensual relationship
10 predicated either on romantic interest or a commercial sex
11 transaction.

12 In sum, allowing Adams to introduce evidence that
13 Visitor-1 requested money from other men with whom she had had
14 sex would risk causing the precise harm to alleged victims that
15 Rule 412 is designed to prevent: The "public disclosure of
16 intimate sexual details and the infusion of sexual innuendo
17 into the fact-finding process." Citing *Spucci*, 217 F.3d at
18 160, which in turn is quoting Federal Rule of Evidence 412,
19 1994 Amendment Committee's note. This proposed evidence has
20 little bearing on Adams' ability to present his defense and
21 effectively cross-examine Visitor-1, and would encourage the
22 jury to speculate about Visitor-1's sexual history.

23 Finally, even if Rule 412 did not forbid introduction
24 of this proposed evidence, it would be excluded under Rule 403.
25 As I have noted, given the other evidence suggesting that Adams

1 and Visitor-1 had a consensual relationship, the evidence of
2 Visitor-1's requests for money from other men with whom she had
3 had sex has little probative value. While the proposed
4 evidence has little probative value, it has the potential to
5 cause significant unfair prejudice. As I have noted, the
6 proposed evidence suggests that Visitor-1 is in effect a
7 prostitute and is trading sex for money. The issue before the
8 jury, however, is the nature of her relationship with Adams,
9 and not her interactions with other men.

10 In sum, the government's motion *in limine* to exclude
11 evidence of Visitor-1's requests for money from other men with
12 whom she had sex is granted pursuant to both Federal Rule of
13 Evidence 412 and Rule 403.

14 The government has moved to exclude both expert and
15 lay testimony from Maureen Baird. Citing the government's
16 motion *in limine* brief, Docket No. 33 at page 3.

17 Baird served as the warden of the MCC between June
18 2014 and December 2015. In an expert witness notice, Adams
19 says that Baird will testify about "the physical state of and
20 working conditions at the MCC and procedures relating to
21 reporting contraband found on inmates and the creation of
22 incident reports." Citing the government's motion *in limine*
23 brief, Docket No. 33, Exhibit A.

24 In his opposition to the government's motion *in limine*
25 Adams states that Baird will testify that:

1 "(1) working conditions at the MCC were exceptionally
2 poor and had a direct impact on correctional officers' morale
3 and behavior;

4 "(2) working conditions deteriorated after Baird's
5 promotion to another federal correctional facility and by mid
6 2019 were extremely bad;

7 "(3) chronic understaffing throughout the BOP and
8 particularly at the MCC resulted in MCC correctional officers'
9 routinely being required to back-to-back shifts; and

10 "(4) double shifts at the MCC were assigned by the
11 lieutenant for a short-handed shift by grabbing correctional
12 officers from the previous shift who had not yet left the
13 facility."

14 Citing the defendant's motion *in limine* opposition,
15 Docket No. 40 at page 5.

16 According to Adams, this testimony is relevant to his
17 state of mind in not reporting that Visitor-1 had smuggled
18 contraband into the MCC. *Id.* at pages 6 to 7.

19 Adams claims that Baird's testimony will demonstrate
20 that his failure to report Visitor-1's misconduct was not
21 motivated by an intent to coerce her into having sex. Instead,
22 Adams claims that he did not make the report because he was
23 worried that -- if he prepared an incident report concerning
24 Visitor-1's misconduct -- he would be pressured to work another
25 shift. *Id.* at page 7.

1 The government moves to preclude Baird's testimony on
2 several grounds.

3 As an initial matter, the government argues that
4 Adams' expert notice is deficient under Federal Rule of
5 Criminal Procedure 16(b)(1)(C) because Adams does not disclose
6 the actual testimony or opinions Baird will offer. Citing the
7 government's motion *in limine* brief, Docket No. 33 at pages 17
8 to 18.

9 The government further argues that Adams is improperly
10 trying to prove his state of mind through Baird's testimony and
11 notes that, in any event, Baird left the MCC in December 2015
12 and Adams' alleged crimes took place in July of 2019. Citing
13 the government's *Daubert* letter, Docket No. 42 at pages 4 to 5.

14 Finally, the government argues that Baird's proposed
15 testimony regarding working conditions and double shifts at the
16 MCC is not outside the ken of the average juror and is
17 therefore not an appropriate subject matter for expert
18 testimony under Federal Rule of Evidence 702(a). *Id.* at pages
19 1 to 3.

20 As to Baird providing lay witness testimony regarding
21 working conditions at the MCC in July 2019, the government
22 repeats that, because Baird left the MCC in December 2015, she
23 is not competent to testify as to conditions at that facility
24 in July 2019. Citing government's motion *in limine* brief,
25 Docket No. 33 at pages 19 to 20.

1 In opposing the government's motion to preclude, Adams
2 argues that:

3 (1) his expert disclosure complied with Federal Rule
4 of Criminal Procedure 16(b)(1)(C);

5 (2) Baird's expected testimony is properly
6 characterized as expert testimony because most jurors are not
7 familiar with the inner workings of the MCC; and

8 (3) Baird has relied on her contacts at the MCC in
9 forming her opinions about the conditions at the MCC in July
10 2019, and expert witnesses are permitted to rely on such
11 hearsay in offering expert testimony. Citing defendant's
12 motion *in limine* opposition, Docket No. 40 at pages 4 through
13 8.

14 I will begin with the issue of notice under Federal
15 Rule of Criminal Procedure 16(b)(1)(C). That rule provides
16 that a defendant wishing to offer expert testimony at trial
17 must "give to the government a written summary of any testimony
18 that the defendant intends to use under Rules 702, 703, or 705
19 of the Federal Rules of Evidence." "This summary must describe
20 the witness's opinions and the bases and reasons for those
21 opinions and the witness' qualifications." Citing *United*
22 *States v. Ulbricht*, 858 F.3d 71, 114 (2d Cir. 2017), which in
23 turn is quoting Federal Rule of Criminal Procedure 16(b)(1)(C).
24 Expert disclosures under Rule 16 are lacking where they "merely
25 list general and extremely broad categories on which the

1 experts might opine." Citing *Id.* at 115.

2 Defects in notice may be cured in supplemental
3 briefing, however, where such briefing "discloses the opinions
4 that the expert intends to offer. See *id.*

5 Adams' initial disclosure -- in the form of a
6 September 25, 2021, letter -- provides only generalized
7 information about Baird's expected testimony. But in his
8 opposition to the government's motions *in limine*, Adams goes
9 into considerably more detail regarding the opinions he expects
10 Baird to offer, including that, by 2019, the working conditions
11 at the MCC had deteriorated and that correctional officers were
12 regularly required to perform double shifts. See defendant's
13 motion *in limine* opposition, Docket No. 40 at page 5.

14 I conclude that with the additional material provided
15 in defendant's opposition brief, Adams has satisfied his notice
16 obligation under Federal Rule of Criminal Procedure
17 16(b)(1)(C).

18 I will now address whether Baird's proposed testimony
19 constitutes proper expert testimony under Federal Rule of
20 Evidence 702.

21 Federal Rule of Evidence 702 provides that "a witness
22 who is qualified as an expert by knowledge, skill, experience,
23 training, or education may testify in the form of an opinion or
24 otherwise" only where:

25 (a) the expert's scientific technical or other

1 specialized knowledge will help the trier of fact to understand
2 the evidence or to determine a fact in issue;

3 (b) the testimony is based on sufficient facts or
4 data;

5 (c) the testimony is the product of reliable
6 principles and methods; and

7 (d) the expert has reliably applied the principles and
8 methods to the facts of the case.

9 Citing Federal Rule of Evidence 702.

10 As part of a district court's gatekeeping role under
11 Rule 701, "a Court must ensure the reliability and relevancy of
12 expert testimony presented to a jury." Citing *United States v.*
13 *Mendlowitz* 2019 WL 6977120 at *4 (S.D.N.Y., December 20, 2019).
14 Expert testimony is properly excluded under Rule 701 if it is
15 "directed solely to lay matters which a jury is capable of
16 understanding and decided without expert's help." Citing
17 *United States v. Castillo*, 924 F.2d 1227 at 1232 (2d Cir.
18 1991). Indeed, "a district court may commit manifest error by
19 admitting expert testimony where the evidence impermissibly
20 mirrors the testimony offered by fact witnesses, or the subject
21 matter of the expert's testimony is not beyond the ken of the
22 average juror." Citing *United States v. Amuso*, 21 F.3d 1251,
23 1263 (2d Cir. 1994).

24 Here, I conclude that Baird's proposed testimony is
25 inadmissible as expert testimony. Adams claims that Baird

1 should be permitted to offer an opinion concerning Adams' state
2 of mind when he failed to report that Visitor-1 had brought
3 contraband into the MCC for an inmate. According to Adams, he
4 failed to report Visitor-1's misconduct merely because he
5 feared that completing an incident report would lead to him
6 being asked to work another shift. Citing defendant's motion
7 *in limine* opposition, Docket No. 40 at pages 6 to 7.

8 Federal Rule of Evidence 704, however, expressly
9 prohibits an expert witness such as Baird from "stating an
10 opinion about whether the defendant did or did not have a
11 mental state or condition that constitutes an element of the
12 crime charged or of a defense" because "those are matters for
13 the trier of fact alone."

14 Although Adams proffers that Baird will testify that
15 "everyone at the MCC was aware that officers who remained in
16 the facility after the conclusion of their shifts ran the risk
17 of being required to stay for another eight hours" -- citing
18 defendant's *Daubert* letter, Docket No. 43 at page 3 -- this
19 testimony has no bearing on what was actually going through
20 Mr. Adams' mind when he decided not to report Visitor-1's
21 misconduct.

22 *United States v. Martoma* is illustrative on this
23 issue. In that case the defendant sought to introduce expert
24 testimony to prove his state of mind, arguing that the expert's
25 opinion constituted circumstantial evidence about whether he

1 had the necessary state of mind to commit securities fraud.
2 Citing *United States v. Martoma*, 993 F.Supp.2d 452, 455
3 (S.D.N.Y. 2014). Martoma claimed that his expert witness would
4 testify that the market was "overheated" for the particular
5 stock he was alleged to have traded using nonpublic
6 information, and that there was therefore little upside for
7 trading in the stock when Martoma traded it. See *Id.* at 454.

8 I granted the government's motion to exclude the
9 expert testimony on the grounds that the expert's "post hoc
10 conclusion that the market for the [traded] stock was in fact
11 overheated in July 2008 would not assist the jury in
12 determining whether Martoma himself believed that the stock was
13 overheated at that time. *Id.* at 455 to 456.

14 The same rationale applies here. Even if Baird were
15 to testify that working conditions at the MCC were abysmal in
16 2019 and that correctional officers feared being asked to work
17 a double shift if they stayed beyond their first shift, this
18 testimony would not assist the jury in assessing whether it was
19 this concern that motivated Adams' decision not to report
20 Visitor-1's misconduct. In sum, Baird's proposed testimony is
21 not probative of Adams' state of mind in July 2019, and is thus
22 irrelevant.

23 Even if Baird's proposed testimony could shed light on
24 Adams' state of mind -- which it does not -- it would still not
25 be an appropriate subject for expert testimony. As I noted

1 earlier, expert testimony is appropriate only where its subject
2 matter is beyond the ken of the average juror. Here, Baird's
3 testimony is "directed solely to lay matters which a jury is
4 capable of understanding without the expert's help." Citing
5 *Castillo*, 924 F.2d at 1232. While it is true that the general
6 public may not be aware of working conditions at the MCC --
7 such as the prevalence of double shifts or the methods by which
8 double shifts are assigned -- such information could be
9 conveyed by a lay witness without any expert training and still
10 be easily understood by a jury. Such routine fact testimony
11 about the day-to-day operations of a workplace plainly fall
12 outside the scope of Rule 702(a). See, e.g., *Pfeiffer v. Lewis*
13 *County* 308 F.Supp.2d 88, 96 (N.D.N.Y. 2004) (holding that
14 proposed testimony about the "job descriptions" and
15 "responsibilities" of state correctional officers did not
16 qualify as expert testimony because "there was nothing
17 complicated about the evidence such that it would be helpful to
18 have assistance from an expert.")

19 In sum, Baird's proposed testimony (1) will not shed
20 light on Adams' state of mind in deciding not to report
21 Visitor-1's misconduct and (2) is not an appropriate subject
22 for expert testimony. Accordingly, the government's motion *in*
23 *limine* to preclude Baird from testifying as an expert witness
24 is granted.

25 Given my ruling on this issue, the government's

1 application for a *Daubert* hearing concerning Baird's
2 qualifications to serve as an expert witness regarding
3 conditions at the MCC in 2019 (See government *Daubert* letter,
4 Docket No. 42 at page 3) is denied as moot.

5 As to Adams' argument that Baird should be permitted
6 to testify as a lay witness, that argument is likewise
7 unpersuasive.

8 While experts are permitted to rely on hearsay if
9 "experts in the field reasonably rely on such evidence in
10 forming their opinions," *United States v. Locasio* 6 F.3d 924,
11 938 (2d Cir. 1993), the same is not true of lay witnesses.
12 Instead, "a lay opinion must be rationally based on the
13 perception of the witness." Citing *United States v. Glenn*, 312
14 F.3d 58, 67 (2d Cir. 2002).

15 Here, Baird left her position at the MCC in December
16 2015. Accordingly, any firsthand knowledge she had of the
17 working conditions at the MCC was stale by July 2019, when
18 Adams committed his alleged crimes. Although Adams asserts
19 that Baird's current opinions about the working conditions at
20 the MCC are based on an unidentified individual with whom she
21 has maintained contact since leaving the MCC, (See defendant's
22 motion *in limine* opposition, Docket No. 40 at page 8) if she
23 were to testify as a lay witness she would not be permitted to
24 rely on hearsay accounts offered by former coworkers.

25 Because Baird's proposed testimony is not admissible

1 either as expert opinion or lay testimony, the government's
2 motion to exclude Baird as a witness is granted.

3 The government has moved to exclude all evidence of
4 working conditions at the MCC -- whether introduced through
5 Baird or any other witness. Citing the government's motion *in*
6 *limine* brief, Docket No. 33 at page 3.

7 The government also appears to seek exclusion of any
8 testimony "regarding the wisdom or efficacy of policies
9 requiring federal correctional officers to report contraband
10 smuggling." *Id.* at page 21.

11 The government contends that evidence regarding work
12 conditions at the MCC, and policies regarding the reporting of
13 contraband, is irrelevant under Federal Rule of Evidence 401
14 and substantially more prejudicial than probative under Federal
15 Rule of Evidence 403. *Id.*

16 As an initial matter, it is not clear that Adams seeks
17 to introduce evidence concerning the wisdom of the MCC's
18 contraband reporting policies. To the extent that he does,
19 such evidence would appear to be improper, since the Second
20 Circuit has made clear that arguments "suggesting that
21 everybody did it and therefore it isn't illegal" are "properly
22 proscribed" because they do not bear on a defendant's guilt or
23 innocence. Citing *United States v. Litvak*, 808 F.3d 160, at
24 189 to 190 (2d Cir. 2015). Accordingly, to the extent that
25 Adams seeks to introduce testimony questioning the wisdom or

1 efficacy of the MCC's policies regarding contraband, the
2 government's motion *in limine* to preclude such evidence is
3 granted.

4 As to the government's motion to preclude all evidence
5 regarding Adams' working conditions at MCC in 2019, however,
6 that motion is denied. While, for the reasons I have
7 explained, Baird is not an appropriate witness to testify about
8 working conditions at the MCC in July 2019, Adams himself has
9 personal knowledge about these matters. Moreover, testimony
10 from Adams concerning his desire to avoid working a double
11 shift appears to go to his state of mind in failing to file an
12 incident report concerning Visitor-1's misconduct.

13 Adams claims that his failure to report Visitor-1's
14 misconduct was not motivated by a desire to coerce Visitor-1
15 into having sex with him. According to Adams, his failure to
16 file an incident report was motivated by his desire to avoid
17 being saddled with a double shift. Citing defendant's motion
18 *in limine* opposition, Docket No. 40 at page 7.

19 The prevalence of double shifts at the MCC;
20 supervisors' alleged practices of assigning a second shift to
21 officers who stayed at the facility after completing a shift;
22 and practices regarding the preparation of incident reports are
23 relevant to Adams' state of mind and his motivation for not
24 reporting the contraband. For reasons already discussed,
25 however, this evidence must come through Adams, because only

1 Adams can testify as to his state of mind.

2 To the extent that Adams seeks to introduce evidence
3 about general disrepair at the MCC, for example, "feces on the
4 floor from broken pipes" (See *Id.* at 8) such evidence is
5 irrelevant because it has no bearing on Adams' motivation for
6 not filing an incident report.

7 In sum, the government's motion *in limine* is granted
8 in part and denied in part as to the evidence regarding Adams'
9 workings conditions at the MCC.

10 I will now turn to Adams' motions *in limine*.

11 Adams' motions are either moot or have been addressed
12 in connection with my rulings concerning the government's
13 motions.

14 Adams seeks to preclude testimony that Joy Aassiddaa,
15 an MCC employee, cried after being told by Visitor-1 that Adams
16 forced Visitor-1 to have sex with him. Citing defendant's
17 motion *in limine* brief, Docket No. 30 at page 2.

18 The government has agreed not to offer such testimony
19 at trial. Citing government's motion *in limine* brief Docket
20 No. 39, page 4.

21 Accordingly, Adams' motion *in limine* is denied as moot
22 with respect to this issue.

23 Adams has moved *in limine* for permission to question
24 Visitor-1 about her previous requests for money from boyfriends
25 or other men she was dating with whom she had sex. Citing

1 defendants' motion *in limine* brief, Docket No. 38 at page 2.

2 As I explained earlier, such evidence is inadmissible
3 under Federal Rule of Evidence 412 and 403. Accordingly,
4 Adams' motion *in limine* is, as to this request, denied.

5 Adams has also moved to preclude testimony that
6 Visitor-1 observed Adams' service firearm in the glove
7 compartment of his car. *Id.*

8 The government has agreed not introduce evidence on
9 this point, unless "the defendant opens the door by, for
10 example, arguing that he did not reinforce the fact that he was
11 an official actor while he drove Visitor-1 to a motel to have
12 sex with him." Citing the government's motion *in limine*
13 opposition, Docket No. 39 at page 4.

14 I am not sure what arguments Adams will make at trial,
15 but at this stage it does not appear that he will dispute his
16 authority as a correctional officer working at the MCC.
17 Moreover, the government has not alleged that Adams threatened
18 Visitor-1 with his service firearm or that he otherwise
19 physically coerced Visitor-1 into having sex with him.
20 Accordingly, the probative value of the firearm would appear to
21 be very slight while the risk of unfair prejudice flowing from
22 admission of the firearm would appear to be great.

23 For present purposes, Adams' motion *in limine* is, as
24 to this issue, denied as moot. If at trial the government
25 believes that Adams has offered evidence that renders the

1 firearm probative, the government will make an application to
2 the Court for admission of such evidence before making any
3 reference to the gun.

4 I am going to turn to the subject of jury selection.
5 As the parties know, we will proceed with jury selection on
6 Wednesday morning. I am available to meet with the parties
7 Wednesday morning at 9:30 to discuss any last-minute issues, so
8 let's plan on meeting in this courtroom at 9:30 that morning,
9 Wednesday morning.

10 Jury selection will begin in the vicinity of 10:15 or
11 so and will take place in the jury assembly room on the first
12 floor of 500 Pearl Street. Once notified that the jury panel
13 is ready for us, we will proceed to Room 120, the clerk's
14 office, where we will line up to enter the jury assembly room.
15 Counsel will meet the jury department staff prior to coming to
16 down to the clerk's office to line up so that the jury
17 department staff can show counsel where they'll be seated.

18 As you know, I have decided to use a jury
19 questionnaire. I have provided the draft questionnaire to
20 counsel this morning.

21 Do the parties have any comments on the questionnaire?

22 MR. SCHAEFFER: Just one clarifying question and then
23 one comment, your Honor.

24 The jury questionnaire is dated October 27, 2021.
25 Does that mean that this questionnaire will be provided in the

1 morning on Wednesday, and then the jurors will leave and come
2 back on Thursday morning?

3 THE COURT: That was my hope. However, I have been
4 told that there is no room available on Thursday. So, sadly,
5 what we are going to have to do is distribute the jury
6 questionnaire on Wednesday morning and then tell the jury panel
7 to come back on Friday. I am sorry to have to do that, but the
8 difficulty is we have a limited number of rooms available large
9 enough to hold the panel consistent with our COVID-19
10 protocols.

11 We had planned on using the ceremonial courtroom on
12 the 9th floor at 500 Pearl for that purpose, but I was told
13 today that another judge has a fairness hearing scheduled for
14 11 o'clock in that courtroom, and he's unwilling to move it.
15 So we don't have access to the ceremonial courtroom on the
16 ninth floor, and we have no other room that's large enough
17 available to hold the jury panel.

18 The jury assembly room itself on Thursday is going to
19 be used as an overflow room for the fairness hearing. This was
20 unexpected, but I haven't been able to find a solution for the
21 problem.

22 So we are going to distribute the jury questionnaires
23 Wednesday morning. We will meet Wednesday afternoon to go over
24 the questionnaires and try to reach agreement on the jury panel
25 members that should be excused based on their answers to the

1 questionnaire. Then we will pick up with the voir dire Friday
2 morning 9:30.

3 MR. SCHAEFFER: The only clarifying comment that we
4 had was to suggest that, to the extent it would more
5 efficiently use the court's time, it might make sense, given
6 the span of time, to introduce some more of the more standard
7 voir dire questions into the jury questionnaire -- for
8 instance, if they knew any of the parties or things like
9 that -- in order to minimize the amount of time we would have
10 to spend on those standard questions on the individual voir
11 dire on Friday.

12 THE COURT: Well, I have two responses. One, my
13 preference is to do as much of the voir dire as possible in
14 public and not by way of questionnaire. Secondly, if you think
15 there are questions that are likely to provoke responses, I'm
16 certainly willing to consider adding them to the questionnaire.
17 The one example you gave does not strike me as one that's
18 likely to be an issue. There may be others, I don't know, but
19 I don't think there's much chance that a lot of jurors are
20 going to say they know Mr. Adams or they know other people
21 whose names will be mentioned at the trial.

22 MR. SCHAEFFER: I think that's right, your Honor. I
23 think the government's view is that this may not be a case
24 where it's so complex that the jury questionnaire itself is
25 necessary. But to the extent we proceed with it, we were just

1 suggesting moving some of the questions over. That said, we're
2 happy to proceed however it makes sense to the Court. We don't
3 think there are any questions here that will provoke such a
4 reaction among the jurors that it can't be dealt with
5 individually in the regular voir dire process.

6 THE COURT: The reason why I'm using the
7 questionnaire -- I certainly agree it's not a complex case.
8 The reason why I was inclined to use the questionnaire is that
9 I have had cases in the past which have involved allegations of
10 sexual abuse or reference to sexual abuse, and I will tell you
11 that it was staggering to me the percentage of the panel that
12 had had such an experience.

13 And what I anticipate, if I don't use a questionnaire,
14 is that I will spend a significant amount of time at the bench
15 questioning people about intimate matters that they would
16 prefer not to talk about. That's why I'm inclined to do it by
17 way of questionnaire. So that's the logic.

18 It is not my habit to use questionnaires. I reserve
19 them for cases that have received significant public attention
20 and in cases where there's something about the subject matter
21 that might be sensitive for people in the jury panel. That is
22 the reason for the use of the questionnaire.

23 MR. SCHAEFFER: I think we defer to the Court's
24 experience in that regard, and we have no comments on the
25 questionnaire itself.

1 THE COURT: All right. Do defense counsel have
2 comments on the questionnaire.

3 MR. GREGORY: No, your Honor.

4 THE COURT: All right.

5 Now let me turn to just the logistics of this.

6 We are only allowed to have 42 members of the panel in
7 the jury assembly room, 42.

8 The rest of the panel will be seated in an overflow
9 room and will watch the proceedings in the jury assembly room
10 by video. If, as a result of excusing people in the jury
11 assembly room, I don't have enough jurors to complete the jury
12 selection process, I will have to restock the chairs in the
13 jury assembly room by bringing people in from the overflow room
14 and pose the same questions to them that I posed in qualifying
15 the first 42.

16 As I said, we will be proceeding in the jury assembly
17 room in 500 Pearl. For purposes of the actual trial, we will
18 be sitting in Courtroom 26B in 500 Pearl.

19 Can I ask the lawyers how long they expect the trial
20 is going to take once we've completed jury selection?

21 MR. SCHAEFFER: Yes, your Honor. From the
22 government's perspective, I think it's right that we're sitting
23 9:30 to 2:30 each day. We expect the government's case would
24 take approximately three days sitting during that period. We
25 understand that there may be a defense case, so it may take a

1 few days after that.

2 THE COURT: All right.

3 Does the defense counsel agree with that estimate?

4 MR. GREGORY: Your Honor, my guess would be two and a
5 half days if we work from 9:30 to 2:30 as proposed.

6 THE COURT: So it sounds like I would be safe in
7 telling the panel that the trial is expected to take a week or
8 possibly less.

9 Does that seem safe?

10 MR. SCHAEFFER: I think that's right, your Honor.

11 MR. GREGORY: Yes, your Honor.

12 THE COURT: Okay.

13 So it is my intention to sit 9:30 to 2:30. The trial
14 I have been engaged in the past two weeks we sat 9:30 to 2:30.
15 There were some days I took two breaks. There were other days
16 I only took one break. It all depended on where we were in
17 terms of the witness testimony. The 9:30 to 2:30 schedule
18 seemed to work well.

19 As counsel is aware, it's difficult to try a case
20 under these circumstances, and I think it's easier for the
21 jury, the 9:30 to 2:30 day. We will, of course, be picking a
22 jury of 12. We will have three alternates.

23 The government will have six peremptory challenges as
24 to the jury of 12; Mr. Adams will have ten. We will then
25 select three alternates. Each side will have two peremptory

1 challenges as to the alternates.

2 After I have qualified enough jurors to complete the
3 process, I will ask you to come up to sidebar and inquire
4 whether there are any challenges for cause. I will then ask
5 you to prepare a list of jurors against whom you wish to
6 exercise peremptory challenges. You are going to have to keep
7 track during the questioning of the jury panel members, those
8 against whom you wish to exercise peremptory challenges.

9 Prepandemic I would have taken a break to give you
10 time to prepare your lists of jurors against whom you wish to
11 exercise peremptory challenges, but the jury staff has told me
12 it's not practical to take a break given the circumstances,
13 because of difficulties in reconvening the panel, making sure
14 everybody is sitting in the right chair, etc. Accordingly, I
15 will ask you to move expeditiously in preparing your lists of
16 the jurors against whom you will exercise peremptory
17 challenges.

18 Your lists will be submitted simultaneously. Once I
19 have your lists I will read them to you. If the same juror
20 appears on both the government list and the defense list, it
21 will simply mean that he or she is excused by both sides.

22 Once we have agreed upon the 12 lowest numbered jurors
23 who have survived the process, we will then turn to the
24 selection of alternates. You will simultaneously submit the
25 list of the two jurors against whom you wish to exercise

1 peremptory challenges. We will then agree on the three lowest
2 numbered jurors who have survived the alternate process, and
3 those individuals will be our alternate jurors.

4 You may have logistical questions about the jury
5 selection process. If you do, please take them up with my
6 deputy, Mr. Ruocco, who ordinarily would be in the courtroom,
7 but he is across the street with the other jury.

8 Any questions about jury selection?

9 MR. TAYLOR: Your Honor, my apologies. Could you
10 repeat how we are supposed to communicate challenges for cause
11 to the Court.

12 THE COURT: Yes.

13 So, as I said, after I've qualified what I deem to be
14 an adequate number to complete the jury selection process, I
15 will ask counsel to come to the bench. I will then ask you
16 whether you have any challenges for cause, and I will rule on
17 challenges for cause.

18 I will then ask both sides to simultaneously submit
19 lists of the jurors against whom they wish to exercise
20 peremptory challenges. The defendant has ten peremptory
21 challenges; the government has six.

22 Assuming that both sides choose to exercise all their
23 peremptory challenges, I will receive a list of ten panel
24 members from the defense and a list of six panel members from
25 the government. Those lists will be submitted simultaneously.

1 I will then read off the names and numbers of the jurors on
2 both lists. We will tell you who are the 12 lowest numbered
3 jurors who have survived the process, and they will become the
4 jury of 12.

5 We will then turn to the selection of alternates. As
6 I said, we will have three alternates, and each side will have
7 two peremptory challenges as to the alternates. So each side
8 will prepare a list of the two panel members against whom they
9 wish to exercise peremptory challenges, and those lists of two
10 will be submitted simultaneously. I will read the names and
11 numbers to you, and then we will tell you who the three lowest
12 numbered jurors are who have survived the process, and they
13 will become our Alternate Jurors 1, 2 and 3.

14 Is that clear?

15 MR. TAYLOR: Yes. Thank you, your Honor.

16 THE COURT: For the voir dire, we do need a list of
17 names that counsel knows might come up at trial. We'll need to
18 include those names in the list. If you can get me that list
19 by say tomorrow at noon that will be helpful.

20 Sometimes a person has a common name. If so, it would
21 be helpful if you could give me some sense of what their role
22 is in this or some other identifying information so that if
23 there's a John Smith in the list I can help the jurors
24 understand whether they would know the John Smith who is in the
25 list.

1 Has the 3500 material been provided?

2 MR. SCHAEFFER: It has your Honor. The government
3 also has binders of exhibits and 3500 for the Court. We're
4 happy to give them to you here or we can deliver them to
5 chambers, whichever is easier.

6 THE COURT: We'll take them with us. Thanks.

7 Are there other matters the lawyers want to raise?

8 MR. SCHAEFFER: A quick scheduling matter, your Honor.

9 On Friday, I assume that we are following the same
10 procedure of meeting here and going over to the jury assembly
11 room.

12 THE COURT: Yes. Well, I suppose there's no need for
13 that unless there's something to talk about. If there is
14 something to talk about, I'm happy to meet with you here. If
15 you don't tell me there's something to talk about, we should
16 just meet there at 9:30.

17 MR. SCHAEFFER: Certainly, your Honor. And then on
18 Friday, would it be the Court's plan to proceed with openings,
19 and should the government have its first witness ready?

20 THE COURT: I think it's reasonable to think that
21 openings might take place on Friday. You know, it's just hard
22 to predict how quickly the jury selection process is going to
23 go.

24 Let me ask you this: How long do the lawyers expect
25 the openings are going to be? Half an hour or less?

1 MR. SCHAEFFER: We are not sure about the defense
2 counsel, your Honor, but we expect ours to be about 15 minutes
3 from us.

4 THE COURT: What about defense counsel?

5 MR. GREGORY: 15 minutes, your Honor.

6 THE COURT: Okay. So, because the openings are so
7 short, yes, I think you should plan on having a witness
8 available, because it's possible that we'll get through jury
9 selection quickly enough. Given the brevity of the openings,
10 it's quite possible that we would get into hearing testimony on
11 Friday.

12 Other questions?

13 MR. TAYLOR: Your Honor, there are certain exhibits
14 which we made a lot of progress with the government, but we
15 have not agreed as to admissibility on them. So I imagine that
16 the Court would appreciate that we queue up some of these
17 issues.

18 THE COURT: Absolutely. Can you give me a sense now
19 of what they are?

20 MR. TAYLOR: Yes.

21 So one category is that there are a series of text
22 messages between Mr. Adams and Ms. Harris after July 5, 2019,
23 which is the date of the liaison. The government has prepared
24 an exhibit that is a subset of those. Our view is that the
25 entirety of those messages should come in. We are disagreeing

1 regarding the relevance, whether 403 should exclude some of
2 those and the hearsay rule. So, I mean, you know, that's where
3 our difference of opinion is.

4 THE COURT: All right. Well, it sounds like what you
5 are suggesting is that these messages would come in in the
6 absence of Mr. Adams' testifying, right?

7 Is that the scenario that you are suggesting?

8 MR. TAYLOR: Well, that is a scenario. But regardless
9 of whether Mr. Adams testifies, our view is that these messages
10 as a whole are relevant to their relationship and shed light on
11 what preceded those messages.

12 THE COURT: The problem is that the vehicle for
13 admitting them in the absence of Mr. Adams would be an argument
14 relying on the rule of completeness. In other words, to
15 understand the text messages that the government is going to be
16 introducing, the jury in fairness needs to see the other text
17 messages. I of course have no way at this point of knowing
18 whether that is true.

19 It is a demanding standard, because essentially the
20 adversary has to argue that the jury would be misled if all it
21 saw was the text messages introduced in this case by the
22 government, that there would be like a misimpression if they
23 didn't see those other text messages that you want to
24 introduce.

25 So what I would say to you is obviously you should

1 continue your discussions with the government, but you should
2 tee up the issue pretty quickly by laying before me the text
3 messages that you are interested in introducing and telling me
4 why that's appropriate. Then obviously the government would
5 need to respond.

6 When do you think you will be in a position that you
7 could do that?

8 MR. TAYLOR: We can get you a letter no later than
9 tomorrow close of business, your Honor.

10 THE COURT: Okay.

11 Does the government have anything it wishes to say
12 about this issue concerning the text messages?

13 MS. BHASKARAN: No, your Honor, we will respond to the
14 defense's letter, if we are going to get it by the close of
15 business tomorrow, which is Tuesday, we would suggest by midday
16 Thursday for a response by the government.

17 THE COURT: How many text messages are we talking
18 about?

19 Let me ask defense counsel.

20 Can you give me a sense of globally what we are
21 talking about here?

22 MR. TAYLOR: It is no a huge number, your Honor. It
23 depends on the presentation. So, for instance, the way that
24 the defense is presenting these messages is from photographs
25 that were taken of Ms. Harris' phone when she was questioned.

1 So there are 22 of those photographs. So you can imagine that
2 each screen shows about five or six messages and then there
3 will be some overlap before you get to the next image so that
4 you are seeing a continuous whole. So if I had to guess, I
5 would say somewhere around maybe a hundred messages in total,
6 many of which are very short, you know, just a couple of
7 letters or an emoji or something like that.

8 THE COURT: How many substantive texts do you think
9 there are once you get rid of the emojis and so forth?

10 MR. TAYLOR: We believe that the emojis are
11 substantive, but I understand your meaning, your Honor. I
12 would estimate somewhere around a half dozen.

13 THE COURT: So I think what would make sense in terms
14 of schedule is that defense counsel will get his letter in by 5
15 tomorrow. Based on what I have heard so far, I am not sure why
16 the government couldn't get its response in by 5 the following
17 day. If for some reason that proves impractical, you will let
18 me know, but given that text messages are generally pretty
19 short it doesn't seem like it's going to take a long time to go
20 through it.

21 Other issues?

22 Anything else besides the text messages that you
23 anticipate are going to present evidentiary issues?

24 MR. TAYLOR: Yes, your Honor.

25 An item that was recovered from Ms. Harris' phone is a

1 DOJ press release.

2 THE COURT: Yes. I talked about that in the bench
3 ruling.

4 MR. TAYLOR: That's correct, your Honor. Counsel and
5 I will review your decision. I think that there might be a few
6 other issues regarding a couple of other items of evidence, but
7 the main things are the text messages.

8 THE COURT: Okay.

9 MR. GREGORY: Your Honor, I did have one request or
10 just thought. That is what the Court's position is on using an
11 exhibit or two during opening statement. Would you permit
12 that?

13 THE COURT: Well, I will hear from the government in a
14 second, but I guess if both sides were a hundred percent
15 confident that the exhibit was going to be admissible at trial,
16 I would certainly consider it.

17 What does the government say about the concept?

18 MR. SCHAEFFER: I think, your Honor, it would depend
19 on what exhibit was going to be shown. We were not planning
20 showing the jury anything during our openings, and I would
21 agree with the Court that we would have to determine that
22 there's no question of admissibility.

23 I think presenting an exhibit out of context in the
24 opening could also be a bit jarring or lead the jury down an
25 avenue that we wouldn't want them to go, so we would have to

1 consider that kind of on an exhibit-by-exhibit basis.

2 THE COURT: All right. If you want to use something
3 in your opening, I would suggest you open discussions with the
4 government about that right away. As I said, I am not
5 rejecting it out of hand. I would want to know what the
6 exhibit is and I would want to know what the government's
7 position is. So I will consider it. So I think we should tee
8 that up issue again as soon as you can.

9 MR. GREGORY: Yes, your Honor. Thank you.

10 THE COURT: Other issues?

11 MR. SCHAEFFER: Nothing on the exhibits or evidentiary
12 issues, your Honor. We just have one thing to put on the
13 record before the conference concludes.

14 THE COURT: Go ahead.

15 MR. SCHAEFFER: An October 12, 2021, the government
16 sent defense counsel a *Pimentel* letter setting forth its
17 understanding of the guidelines that are applicable in this
18 case, that those guidelines calculations result in a sentencing
19 range of 27 to 33 months' imprisonment.

20 THE COURT: Has there been any response from the
21 defense with respect to your *Pimentel* letter?

22 MR. SCHAEFFER: No, your Honor, there has not.

23 THE COURT: Okay.

24 So, Mr. Adams, let me just address you directly for a
25 moment. The government tells me that they provided your

1 counsel with what's called a *Pimentel* letter, which is a letter
2 that sets forth the government's understanding of what it
3 believes is the sentencing guidelines exposure in this case.

4 What the assistant has said is that the government at
5 least currently believes that the sentencing guidelines range,
6 applicable range is 27 to 33 months' imprisonment.

7 Have you spoken with your counsel about this *Pimentel*
8 letter?

9 THE DEFENDANT: Yes, your Honor, I have.

10 THE COURT: And have you discussed with counsel
11 whether it's in your best interest to go to trial in this case
12 given all the circumstances?

13 THE DEFENDANT: Yes, I have, your Honor.

14 THE COURT: Is it your conclusion after consultation
15 with counsel that it is in your best interest to proceed to
16 trial?

17 THE DEFENDANT: Yes, your Honor.

18 THE COURT: All right. Thank you.

19 Anything else?

20 MR. SCHAEFFER: This may be a pie-in-the-sky request,
21 your Honor, but is there any possibility that perhaps we could
22 do the questionnaires on Wednesday and the voir dire
23 questioning in the afternoon on Wednesday just to conserve the
24 Court's time, or is that not possible?

25 THE COURT: Let me explain the process.

1 So I think we have called for about 90 jurors. My
2 deputy would know better than I do. So what's going to happen
3 is these 90 people, or whatever number it is that is being
4 provided to us, they are all going to complete the
5 questionnaires.

6 Then the questionnaires have to be Xeroxed. We've got
7 to do that.

8 Then the questionnaires have to be provided to the
9 parties.

10 And then the parties have to have an opportunity to
11 review the questionnaires and make a decision about whether
12 they believe that certain panel members should be excused on
13 the basis of their responses to the questionnaire.

14 So my experience in the past is that that takes a fair
15 amount of time. That is to say the Xeroxing takes time,
16 counsel's review of the completed questionnaires takes time,
17 and then our discussion of the questionnaires takes time.

18 So, to put it in perspective if we start with -- the
19 earliest that we are going to be able to start with the panel
20 is about 10:15 because there are some preliminaries that the
21 jury staff goes through with them. Realistically it is going
22 to be later than 10:15.

23 Realistically it could easily be 11 before I even meet
24 with them. So I give them the questionnaire. They fill it
25 out. Let's assume that process is over by say 11:45 or 12

1 noon.

2 Then, as I've said, we've got to Xerox 80 to 90
3 questionnaires, we have got to get them to you, you've got to
4 review them, and then we have to talk about them.

5 My experience in the past is that if we can have our
6 meeting to discuss the questionnaires at 2:30, we will be doing
7 very well. To get through 90 questionnaires is likely going to
8 take us until 5.

9 So I just couldn't see how it's possible to do
10 anything with the panel that same day. I've explored whether
11 we could utilize the jury assembly room as well as the overflow
12 room, the ceremonial courtroom, in the afternoon of Thursday.

13 I have been told no, because the judge anticipates
14 that, I guess that there will be objections to the proposed
15 settlement, and he's expecting a large turnout. I don't know
16 much about the case. I haven't had time to even find out what
17 the case is. But the long and short of it is I have been told
18 that we cannot utilize either the jury assembly room or the
19 ceremonial courtroom for any period of time on Thursday.

20 Unfortunately, we have so few rooms available that are
21 large enough to permit 40 people to be inside, given the COVID
22 restrictions, that there are just very limited options. I have
23 explored whether the large courtrooms in this building are
24 available, like 110 or 506 or 318, and I'm told that they are
25 all committed for purposes of trials. So we have very limited

1 options. The fairness hearing was scheduled in April, so it's
2 been scheduled for a very long time. The judge was unwilling
3 to adjourn it to another date. That's where we are.

4 So I don't have any ideas. I've tried to explore with
5 the jury staff what other options there might be, and I didn't
6 come up with any options.

7 So it's not the way I would prefer to proceed, but
8 nothing about what we're doing during this pandemic is the way
9 I want to proceed, so my hands are tied at this point. If you
10 have any ideas, I'm happy to consider them, but I'm fresh out
11 of ideas on this one.

12 MR. SCHAEFFER: Understood, your Honor. Nothing that
13 it sounds like the Court hasn't already tried. Thank you.

14 THE COURT: All right.

15 If there's nothing else, we will meet again 9:30
16 Wednesday morning here to talk about any last-minute issues.
17 Once we hear from the jury clerk that they are prepared for us,
18 we will head over to the 500 Pearl jury assembly room to begin
19 the process through the distribution of the questionnaire and
20 we'll take it from there.

21 If there's nothing else, we are adjourned.

22 Thank you.

23 (Adjourned)
24
25